Miller vs. *Thompson*, 1 Wendell's Rep. 447, and the numerous other cases, English and American, relied upon by the counsel for the plaintiff in error; and hold, that the present action may be maintained by the mother, although by reason of the fact, that the father was living at the time of the seduction, and the seduced was at the time a member of his family, and rendering service to him, the mother was not then, nor could she be, in law, entitled to the services of the daughter: but the latter having remained with the mother, after the father's death, in the presumed relation of servant, and the trouble and expenses of lying-in having fallen upon her, the action is maintainable on this ground.

Judgment affirmed.

RECENT ENGLISH DECISION.

In the Court of Exchequer.—Sittings in banc after Hilary Term, February 21, 1857.

DEGG, ADMINISTRATRIX *vs.* THE MIDLAND RAILWAY COMPANY.[1]

A person who came voluntarily to assist the servants of a railway company, doing some work on the railway, was accidentally killed by the negligence of some other servants of the company. The railway company not having authorized the negligence, and the servants being persons of ordinary skill and care for the work,—Held,

First, that no action lay against the company by the personal representative of the deceased under the 9 & 10 Vict. c. 93;[2] and,

Secondly, that the above facts constituted a defence under the plea of not guilty.

This was an action brought under the 9 and 10 Vict. c, 93, by the administratrix of one Degg, to recover damages for the death of the deceased. The declaration alleged that the defendants were possessed of a certain railway, and engines and carriages upon it, and by their servants were at work on the railway with those carriages and engines, and carelessly, negligently and improperly moved and propelled certain trucks against other trucks, without due notice or

[1] 21 Jur. 395.

[2] This statute has been substantially re-enacted in many of the States. See 1 Tidd's Pract. 9 note, Am. edition.—*Eds. Am. L. Reg.*

precaution, in consequence whereof, and of the carelessness, negligence and unskillfulness of the defendants by their servants, the deceased was killed, &c. To this declaration the defendants pleaded first, not guilty; and secondly, a special plea, to the effect that at the time of the accident the deceased was voluntarily assisting some of the servants of the defendants in their work on the railway; that the servants of the defendants were persons of ordinary skill and care for the work on which they were employed; and that the act in question was done and the injury inflicted without the authority of the defendants. To this plea the plaintiff demurred; and issue having been joined on both pleas, the cause was tried before Alderson, B., when it appeared that the deceased met his death in the manner stated in the pleadings; namely, some servants of the defendants being engaged in moving trucks along the railway, the deceased volunteered to assist them, and in so doing was accidentally killed by a truck which had been set in motion by some other servants of the defendants. On this evidence the judge told the jury that the defendants were bound to appoint persons of ordinary skill and care to work on their railway, and if the servants whose conduct caused the accident were not such, their verdict ought to be for the plaintiff. If, however, those servants were persons of ordinary skill and care, although they might have been guilty of negligence in the particular act which caused the death of the deceased, the defendants would be entitled to their verdict. The jury found for the plaintiff on the general issue, and for the defendants on the special plea; the judge reserving leave to enter a verdict for the defendants on the first issue, if the court should on demurrer hold the special plea good, and that the finding on the issue raised by it necessarily amounted to a finding for the defendants on the general issue.

Keating, in Michaelmas Term, having obtained a rule accordingly, the demurrer and the rule were argued in the Michaelmas Term, (Nov. 22), and again in Hilary Term, (Jan. 14), before Pollock, C. B., Martin, Bramwell, and Watson, BB., by

Pigott, Serjt. for the plaintiff; and

Keating and *Phipson*, for the defendants.

The arguments fully appear in the judgment; and the following authorities were referred to:—*Brock* vs. *Copeland*, 1 Esp. 203; *Ilott* vs. *Wilkes*, 3 B. & Al. 304; *Bird* vs. *Holbrook*, 4 Bing. 628; *Priestly* vs. *Fowler*, 3 M. & W. 1; *Davies* vs. *Mann*, 10 M. & W. 546; *Lynch* vs. *Nurdin*, 1 Q. B. 29; *Barnes* vs. *Ward*, 19 L. J., C. P. 195; *Rigby* vs. *Hewitt*, 5 Exch. 240; *Greenland* vs. *Chaplin*, Id. 243; *Hutchinson* vs. *The York, Newcastle and Berwick Railway Company*, Id. 343; *Wigmore* vs. *Jay*, Id. 354; *Wiggett* vs. *Fox*, 11 Exch. 832; *The Manchester Railway Company* vs. *Wallis*, 23 L. J., C. P. 85; *Lygo* vs. *Newbold*, Id. Ex. 108; *Tarrant* vs. *Webb*, 18 C. B. 797; *Southcote* vs. *Stanley*, 15 L. J. Ex. 339; *Paterson* vs. *Wallace*, 1 Macq. 748; and Reg. Gen., T. T., 1853, (Pleading,) r. 16.

Cur. adv. vult.

The judgment of the court was now delivered by

Bramwell, B.—In this case there were two questions for our determination—the first, whether the plea demurred to was good; the second, whether the verdict found for the plaintiff on the general issue should stand, or be entered for the defendants. We reserved our judgment not from any doubt on the merits of the dispute between the parties, but from a difficulty as to the point of pleading raised by the second question.

The facts stated by the declaration and the plea demurred to may be thus summed up:—The defendants were possessed of a railway and carriages and engines; their servants were at work on the railway in their service, with those carriages and engines; the deceased voluntarily assisted some of them in their work; others of the de-defendants' servants were negligent about their work, and by reason thereof the deceased was killed; the defendants' servants were persons competent to do the work; the defendants did not authorize the negligence.

We are of opinion that under these circumstances the action is not maintainable. The cases show that if the deceased had been a servant of the defendants, and injured under such circumstances as occurred here no action would be maintainable; and it might be

enough for us to say that those cases govern this, for it seems impossible to suppose that the deceased, by volunteering his services can have any greater rights, or impose any greater duty on the defendants, than would have existed had he been a hired servant. But we were pressed by an expression, to be found in those cases, to the effect, that "a servant undertakes, as between him and the master to run all the ordinary risks of the service, including the negligence of a fellow servant:" *Wigget* vs. *Fox*, 11 Exch. 832, and it was said there was no such undertaking here. But in truth there is as much in the one case as in the other; the consideration may not be as obvious, but it is as competent for a man to agree, and as reasonable to hold that he does agree, that if allowed to assist in the work, though not paid, he will take care of himself, from the negligence of his fellow workman, as it would be if he were paid for his services.

But we were also told that there was and could be no agreement; that Degg was a wrongdoer, and therefore the action was maintainable. It certainly would be strange that the case should be better if he were a wrongdoer than if he had not been. We are of opinion that this argument cannot be supported. We desire not to be understood as laying down any general proposition, that a wrongdoer never can maintain an action. If a man commits a trespass to land, the occupier is not justified in shooting him; and probably if the occupier were sporting or firing at a mark on his land, and saw a trespasser, and fired carelessly and hurt him, an action would lie. Nor do we desire to give any opinion on the cases cited of *Bird* vs. *Holbrook*, 4 Bing. 628, and *Lynch* vs. *Nurdin*, 1 Q. B. 29; but it is obvious and a truism to say that a wrongdoer cannot, any more than one who is not a wrongdoer, maintain an action, unless he has a right to complain of the act causing the injury, and complain thereof against the person he has made defendant in the action. Now, it may be, that had the mischief here resulted from the personal act of the master, he knowing that the deceased was there, the master would have been liable; and that as the defendants' servants knew the deceased was on the railway, and because they knew that, were guilty of a wrong to him, they are liable to an action; but on

what reason or principle should the defendants be? If a servant is driving his master in a carriage, and a person gets up behind, and the servant knowing it, drives carelessly and injures that person, the servant may be liable, but why the master? The law, for reasons of supposed convenience more than on principle, makes a master liable in certain cases for the acts of his servants—not only in cases in the nature of contract, which depend on different considerations, but in cases independent of contract, such as negligent driving in the public streets, when damage is thereby done. This is the responsibility the law has put on them; there is a duty on them to take care that their servants do no damage to others by negligence in their work for their master, or to compensate the sufferer where such damage is done. The public interest may require this for the public benefit; but why should a wrongdoer have power to create such a responsibility and such a duty? No reason can be assigned. Some acts are absolutely and intrinsically wrong, where they directly and necessarily do an injury, as a blow; others only so from their probable consequences. There is no absolute or intrinsic negligence; it is always relative to some circumstances of time, place, or person. It is not negligent or wrong for a man to fire at a mark on his own grounds at a distance from others, or to ride very rapidly in his own park; but it is wrong so to fire near to, and so to ride on the public highway; and though the quality of the act is not altered, it is wrong in whoever does it, and so far it is as though it were intrinsically wrong. So the act of firing or riding fast in an enclosure becomes wrong if the person doing it sees there is some one near whom it may damage. But the act is wrong in him only for the personal reason that he knows of its danger; it would not be wrong in any one else who did not know that. Now for a willful act intrinsically wrong by a servant, the master is not liable. By a parity of reason, he ought not to be where the act, not wrong in itself, is only so for reasons personal to the servant, and his willful disregard of them. The master's liability ought be limited to that which he may anticipate and guard against, namely, the middle class of cases we have put. However this may be, it seems to us there can be no action except in respect of a duty infringed, and that no man by his wrongful act can impose a duty; and as a direc-

tion by the master to drive furiously, or in the way called carelessly, in his park, would not be wrong in the master, it cannot be made so by a trespasser getting there, and being hurt; so that, quoad the master, it is damnum absque injuria; and if not a wrong in the master when expressly ordered, it cannot be if done by the servant against his orders. The defendants might, if they had thought fit, have directed their servants to move and propel trucks against other trucks without any notice or precaution—in short to do what the plaintiff complains of; and if their servants chose to work on those terms, although it might be a wasteful way of using their engines and carriages, no one could say it was wrongful. Then the deceased cannot make it so by coming there himself. Upon these grounds, then, whether he is considered a wrongdoer or not, we are of opinion the action cannot be maintained, and that the plea is good.

The same consideration determines the points of pleading in the defendants' favor. "Not guilty" puts in issue the act complained of. Now, the defendants did not, by their servants, carelessly, negligently, and improperly move the trucks; nor was the deceased injured thereby by the negligence, carelessness, and improper conduct of the defendants by their servants, as such. There was no general carelessness or wrong in the act complained of—a personal wrong in the defendants' servants relatively to the deceased being there. There was, therefore, no negligence in the defendants by their servants, and they are not guilty. The verdict on that plea, therefore, must be for them.

Judgment for the defendants on the demurrer, and rule absolute to enter the verdict for them on the first issue.

SHORT NOTES OF RECENT ENGLISH CASES;

BEING A SELECTION OF ADJUDGED POINTS.

HUTCHISON *vs.* SKELTON. 2 Macqueen, 495.

Ademption.

"Cases of ademption proceed upon this ground; that if a testator makes a will, and gives that which is in the nature of a portion to his daughter, say £5,000 *simpliciter*, and afterwards in his lifetime the daughter marries,